Office-Supreme Court, U.S.
FILED
APR 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1592

In The

Supreme Court of the United States

October Term, 1980

JACQUELINE DE VILLOUTREY PAIN, et al.,
Petitioners,

v.

UNITED TECHNOLOGIES CORPORATION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court properly held that the criteria set forth in *Gulf Oil Corp.* v. *Gilbert* govern the *forum non conveniens* determination when American citizens are plaintiffs and the alternative forum is foreign.

2. Whether the court properly exercised its inherent discretion not to retain jurisdiction over actions having no contact with the forum on the grounds of *forum non conveniens* when:

(a) The accident giving rise to the litigation occurred in Norwegian territorial waters;

(b) The aircraft was owned and operated by a Norwegian corporation;

(c) The wreckage, and the maintenance and operation records relating to the aircraft, are located in Norway;

(d) An official investigation of the accident was conducted by the Norwegian Civil Aviation Administration; and

(e) Defendant United Technologies has agreed to submit to the jurisdiction of the foreign courts where the primary beneficiaries of the decedents reside and to proceed if at all on the issue of damages alone.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent United Technologies Corporation respectfully submits that this Court should deny the petition for a writ of certiorari to review the unanimous decision of the United States Court of Appeals for the District of Columbia. That court's official opinion appears at 637 F.2d 775 (D.C. Cir. 1980).

COUNTERSTATEMENT OF THE CASE

These wrongful death actions arise out of the crash of a helicopter in the North Sea on June 26, 1978. Eighteen individuals died in the accident. Fourteen were clearly solely citizens of Norway. The rest were Jacques Pain, a

French citizen and domiciliary; Keith Edward Sibthorpe, a British citizen and resident; Dennis Iver Kahn, an American citizen residing in Norway, and Kjell Ivar Christophersen, a Norwegian resident holding duel Norwegian-Canadian citizenship.

These actions were brought by the survivors of decedents Pain, Sibthorpe, Kahn, Christophersen and Frederick Johan Frantzen, a Norwegian citizen and resident. They were instituted in the United States District Court for the District of Columbia. With a single exception, each of the plaintiffs resides outside the United States. The Christophersen, Kahn and Frantzen plaintiffs reside in Norway. The Pain plaintiffs reside in France. The Sibthorpe plaintiffs reside in Great Britain.

Since decedent Kahn, although a resident of Norway and married to a Norwegian, had retained his American citizenship, it was alleged that his children are citizens both of the United States and Norway. The Kahn children reside with their mother, a Norwegian citizen, in Norway. The sole American plaintiff, the mother of the deceased Kahn, is an American citizen residing in New Hampshire.

These undisputed facts were weighed by the District Court in evaluating UTC's motion to dismiss:

The aircraft was owned and operated by a Norwegian corporation, Helikopter Service A.S. (Helikopter). Helikopter is not subject to service of process or to discovery within the United States.

The aircraft was maintained by Helikopter in Norway from the date of its delivery.

The aircraft was on a flight from Norwegian soil to an oil rig in the North Sea when it crashed.

The wreckage of the aircraft is located in Norway.

An official investigation of the accident was conducted

by the Norwegian Civil Aviation Administration. The records of that investigation and the officials who conducted it are located in Norway.

The flight crew resided in Norway. Their training records and qualifications are kept in Norway.

Witnesses competent to testify as to the decedents' earning capacity, health and life expectancy reside outside the United States. There is no compulsory process available to obtain, the testimony of many of those witnesses, in an action in the United States.

In support of its motion to dismiss, United Technologies agreed to submit to the jurisdiction of the courts where the plaintiffs reside. In addition, United Technologies agreed not to contest liability and to proceed to trial in those jurisdictions only on the issue of damages if the actions were dismissed on the grounds of *forum non conveniens.*

On March 29, 1979, the district court entered five separate orders granting UTC's motions to dismiss on grounds of *forum non conveniens.* Each of the orders was conditioned upon UTC's consent to personal jurisdiction in the appropriate foreign court, waiver of any defense of statute of limitations were suit to be brought within one year from the date of dismissal, and agreement to proceed directly to trial only on the issue of damages, without contesting liability, in any suit filed in the foreign court. J.A. 8a-10a.

On November 17, 1980, the Court of Appeals for the District of Columbia affirmed the orders entered by the District Court in an opinion reported at 637 F.2d 775.

Since the entry of the orders dismissing these actions, plaintiffs have instituted suit in the courts of Norway.

REASONS FOR DENYING THE WRIT

A. The Criteria Set Forth In Gulf Oil v. Gilbert Govern The Forum Non Conveniens Determination When American Citizens Are Plaintiffs And The Alternative Forum Is Foreign

The landmark federal decision on the doctrine of *forum non conveniens* is *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947). That case involved an action brought by a Virginia plaintiff in the Southern District of New York against a Pennsylvania defendant to recover damages caused by a fire in a warehouse located in Virginia. Acknowledging that a court "may resist imposition upon its jurisdiction," 330 U.S. at 507, Justice Jackson, in approving a dismissal on *forum non conveniens* grounds, set forth two sets of factors that should be balanced in ruling on a *forum non conveniens* motion: those factors relevant to the convenience of the litigants and those relevant to the convenience of the forum. The "private interest factors" include:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions to the enforcibility [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. 330 U.S. at 508.

The "public interest factors" were defined as:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is rea-

> son for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. 330 U.S. at 508-09.

The standard for *forum non conveniens* is therefore a balance of the interests of the plaintiff, the defendant, and the forum. Acknowledging that no attempt had been made to catalogue the circumstances which will require either grant or denial of a *forum non conveniens* motion, this Court noted that the "doctrine leaves much to the discretion of the court . . ."*Gilbert,* 330 U.S. at 508.

In the instant case the District of Columbia Circuit observed that the district judge "carefully evaluated all factors relevant to determining a *forum non conveniens* motion . . ." *Pain,* 637 F.2d at 780. In addition, the District of Columbia Circuit's "own evaluation of those factors, coupled with [its] understanding of applicable law, convince[d] [the court] that conditional dismissal was particularly appropriate here because more serious obstacles to fair trial exist in this forum than in alternative forums abroad." *Pain,* 637 F.2d at 780.

Notwithstanding the careful examination of the *Gilbert* factors by both the district court and court of appeals, plaintiffs urge that both courts failed to give sufficient weight to a single factor—the American citizenship of the Kahn children, who do not reside in the United States, and the American citizenship of the mother of the deceased Kahn. When distilled to its essence, the plaintiffs' conten-

tion is that the Gilbert criteria must be overturned and replaced with a different standard when the plaintiffs are American citizens.

Indeed, plaintiffs suggest that they are entitled to an absolute privilege to litigate the claims relating to those plaintiffs with putative American citizenship in courts of the United States. Counsel for plaintiffs, although purportedly representing all of the plaintiffs, appear to abandon the claims of those plaintiffs who have no connection with the United States.

It has long been recognized, however, that an "American citizen does not have an absolute right under all circumstances to sue in an American court." *Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F.2d 633, 645 (2d Cir. 1956), *cert. denied*, 352 U.S. 871 (1956). To permit such a right of access would effectively leave "both the defendant and the court essentially helpless in the face of a plaintiff's decision to bring an action in a forum which clearly is not the most appropriate one to hear the case." *Pain*, 637 F.2d at 798-99, *quoting from* Recent Developments, *Federal Courts: Forum Non Conveniens*, 20 Harv. Int'l. L. J. 404, 412 (1979).

Although courts were at one time reluctant to dismiss claims brought by U. S. citizens on *forum non conveniens* grounds, the clear trend and better reasoned decisions recognize that there is no "talismanic significance to the citizenship or residence of the parties." *Alcoa Steamship Co.* v. *M/V Nordic Regent*, 636 F.2d 860, 867 (2d Cir. 1980) (en banc) ("*Alcoa*").

In *Alcoa* the Second Circuit, affirming a *forum non conveniens* dismissal, rejected the proposition urged here that American citizens should be accorded preferential access to courts in the United States although other facts point to

dismissal. Relying upon a decision by the New York Court of Appeals in *Silver* v. *Great American Insurance Co.*, 29 N.Y.2d 356, 278 N.E.2d 619 (1972), the *en banc* Second Circuit wrote:

> Although such residence is, of course, an important factor to be considered, *forum non conveniens* relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties. The great advantage of the doctrine—its flexibility based on the facts and circumstances of a particular case—is severely, if not completely, undercut when our courts are prevented from applying it solely because one of the parties is a New York resident or corporation. 636 F.2d at 868.

Prior to *Alcoa* the Second Circuit had squarely addressed the question of the district court's power to remit an American plaintiff to a foreign forum in *Farmanfarmaian* v. *Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978). Describing the holding in *Farmanfarmaian*, Judge Timbers wrote that: "It follows, if this recent decision of our Court means anything, that American citizenship is *not* an impenetrable shield against dismissal on the ground of forum non conveniens." *Alcoa*, 636 F.2d at 865.

Although the Second Circuit has led the way in determining the realistic significance of the citizenship of the parties, it has not been alone. In *Mizokami Bros.* v. *Baychem Corp.*, 556 F.2d 975 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), the Ninth Circuit held that a district court properly dismissed on *forum non conveniens* grounds even though it remitted an American plaintiff to the Mexican courts for relief. In that case Mizokami Bros., a United States importer of Mexican produce, sustained

losses when customs officers refused entry to a produce shipment because of excessive chemical contamination. Citing the discretion granted to district courts under *Gilbert*, the court concluded:

> The plaintiff falls back on its United States citizenship as the sole and only possible basis for suing these defendants in a court of the United States. This is not enough. In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere. 556 F.2d at 978.

Plaintiffs argue that because there is a split of authority on this issue among the circuits, this Court should intervene and establish new criteria. They cite two cases: a decision by the Fifth Circuit and the Third Circuit's decision in *Reyno* v. *Piper Aircraft Co.*, 630 F.2d 149 (3d Cir. 1980), *petition for cert. granted*, 49 U.S.L.W. 3617 (U.S. Feb. 23, 1981) (No. 80-848). Plaintiffs do not supply the style or the citation of the Fifth Circuit case, and we have not been able to locate it. Consequently there is no way we can comment upon, or distinguish it.

However, *Reyno* is not only distinguishable from the instant case, it actually supports the result in *Pain*. Plaintiffs argued on appeal in *Reyno* that the defendants should have been equitably estopped from asserting that Scotland was a more appropriate forum because they had argued in a California court prior to a 28 U.S.C. § 1404 transfer that Pennsylvania was the most appropriate forum. Although the Third Circuit reversed the dismissal on *forum non con-*

veniens grounds, that same court, in a more recent opinion, said that a "reading of the *Reyno* opinion reveals that the defendants' prior inconsistent position in the California court on the transfer motion weighed heavily in the court's resolution of their motion for dismissal on grounds of *forum non conveniens* in Pennsylvania." *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027, 1033 n. 2 (3d Cir. 1980). Of singular importance is the Third Circuit's approving citation of *Alcoa* and comment that "American citizenship of the plaintiff does not increase the defendant's burden, just as foreign citizenship may not lessen it." *Reyno*, 630 F.2d at 159.

The decisions by the Second, Third and Ninth Circuits and now the District of Columbia Circuit in *Pain* reflect a growing awareness that the judicial reluctance to dismiss actions to competent foreign courts on grounds of citizenship alone "may merely reflect an unthinking orientation overly protective of American plaintiffs—even those who reside abroad—and 'insufficiently sensitive to the ability of foreign courts to perform their adjudicatory functions fully as well as do the courts of the United States.' " *Pain*, 637 F.2d at 797 *quoting from* Recent Developments, *Federal Courts: Forum Non Conveniens*, 20 Harv. Int'l. L. J. 404, 412 (1979). Indeed, the reluctance of U. S. courts to expect American domiciliaries to litigate what are essentially foreign controversies in foreign courts is logically indefensible, reflects a parochial view of justice in other civilized nations and produces certain undesirable consequences.

First, "[s]uch reluctance deters revision or repeal of internationally undesirable rules of competence . . . [t]he *forum non conveniens* doctrine appears to offer the most promising currently feasible remedy for cases commenced in a 'competent' but clearly inappropriate forum." Ginsberg,

The Competent Court in Private International Law: Some Observations on Current Views in the United States, 20 Rutgers L. Rev. 89, 99-100 (1965).

Second, if the courts apply one standard to U. S. citizens and a different standard for noncitizens, they may run afoul of treaty obligations. The difficulty which would accrue upon adoption of the higher standard suggested by plaintiffs for U. S. citizens was treated by the Second Circuit in *Alcoa*:

> We maintain Treaties of Friendship, Commerce and Navigation, or similar agreements, with dozens of foreign nations. Many include "no less favorable" treatment clauses like the one found in the Iranian treaty addressed in *Farmanfarmaian*. The approach urged upon us by appellant—requiring a showing of vexation before an action may be dismissed on the ground of forum non conveniens when the plaintiff is an American citizen—would leave the federal courts on the horns of a difficult dilemma if the action involved a plaintiff who is the beneficiary of such a treaty clause. The courts either would be obliged to apply this same vexation standard to foreign nationals who are the beneficiaries of such clauses, thus barring dismissal for all practical purposes and crippling the concept of forum non conveniens, or they would have to do violence to our treaty obligations which of course are paramount under the Constitution. Under the approach we take today—adhering to the simple uniform standard of *Gilbert* in all instances—this problem will not arise. 636 F.2d at 865-66.

Therefore, to fabricate an exception to *Gilbert*, which already protects the plaintiff's choice of forum, and create a virtually absolute right of access for American citizens to federal courts might constitute a breach of international accords and procedural uniformity.

Third, the fact that a few of the plaintiffs hold American citizenship is completely inapposite to the considerations guiding courts in *forum non conveniens* determinations. Judge Wilkey, writing for the court in *Pain*, 637 F.2d at 797, explained that "[a]t best, citizenship serves as an inadequate proxy for the American *residence* of plaintiff, which in turn is only one indicator of how *inconvenient* it may be for the plaintiff to litigate his case in a foreign forum, as measured by the *Gilbert* factors of private interest."

Finally, as a factual matter, plaintiffs failed to establish that the American residence of one of the plaintiffs was in any way determinative. The record reflected that in all likelihood the single American resident was made a party for the purposes of defeating a dismissal on *forum non conveniens* grounds. *See* Norwegian newspaper articles reproduced in the Joint Appendix at 62a-66a concerning the activities of the Speiser, Krause firm in Norway [637 F.2d at 797 n. 130]. The claims brought by the deceased Kahn's mother are in fact illusory. Kahn was survived by his wife and children. Under such circumstances Kahn's mother had no right to bring suit in the first instance. *Futch* v. *Midland Enterprises, Inc.*, 471 F.2d 1195 (5th Cir. 1973); *Porche* v. *Gulf Mississippi Marine Corp.*, 390 F.Supp. 624 (E.D. La. 1975).

In summary, the court in *Pain* reached the proper result not only because the weight of authority now holds that American citizenship is no bar to a *forum non conveniens* dismissal but also because on this record plaintiffs failed to establish that the American citizenship of the Kahn children, who do not reside in the United States, and the American residence of the mother of the deceased Kahn, should be afforded any special weight. The standard set forth in

Gilbert sufficiently protects American citizens because jurisdiction must be retained unless the balance tips heavily in favor of dismissal. In this case defendant has satisfied its burden.

B. The Court Properly Exercised Its Discretion Not To Retain Jurisdiction Over These Actions Having No Contact With The Forum

As the court of appeals opinion indicates, the district judge carefully weighed all the factors—private and public—in making his *forum non conveniens* ruling. *Pain*, 637 F.2d at 785. Having first acknowledged the possible alternative forums including Connecticut and the foreign courts, the district judge went on to weigh systematically each of the *Gilbert* factors. *Pain*, 637 F.2d at 785; J.A. at 14a, 48a. He considered both the drawbacks of the local forum and the relative superiority of trial in the Norwegian courts. *Pain*, 637 F.2d at 785; J.A. at 48a-51a. Concluding that the balance tipped heavily in favor of dismissal, the district judge then sought to insure the availability of an adequate alternative forum:

> By entering dismissal only on the condition that UTC agree to submit to the jurisdiction of the various foreign courts of appellants' choice, Judge Hart ensured that the defendant would both appear and defend in an alternative forum. By requiring the defendant not to contest liability in those foreign jurisdictions and to proceed to trial only on the issue of damages, he exacted a concession from UTC as the price for permitting it to shift the case from plaintiffs' chosen forum. By requiring waiver of foreign statutes of limitations, he effectively forced UTC to waive any advantage it might have gained from delay. Finally, by expressly providing that the suits could be reopened in the United

> States without prejudice should any of the stipulated conditions fail to materialize, Judge Hart protected the plaintiffs' right to reinstitute and try the case while simultaneously encouraging plaintiffs to try that case in a nation more closely connected to the event giving rise to the suit. 637 F.2d at 785.

On appeal, the District of Columbia Circuit approved the district judge's use of precautions to secure adequate alternative forums. Then conducting its own appraisal of the private and public interest factors, the court of appeals concluded that:

> [E]ven acknowledging that the *Gilbert-Koster* presumption places a heavy burden on the defendant to establish that the plaintiff's choice of forum is *not* appropriate, we believe that the defendant here has in fact carried its heavy burden. The defendant has presented substantial and compelling evidence of both *public* and *private* factors which indicate the inferiority of the plaintiffs' chosen forum to other overseas. We find the factors favoring dismissal here sufficiently weighty to overcome even the strong *Gilbert-Koster* presumption in favor of plaintiff's forum choice. 637 F.2d at 786.

With respect to the private interest considerations of relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses, and the possibility of a view, the district court held, and the court of appeals affirmed, that the balance weighed "very heavily in favor of Norway in this case" both as to liability and to damages. *Pain*, 637 F.2d at 786; J.A. at 48a. In a case with strikingly similar facts arising out of the crash of a Norwegian owned and operated helicopter in the North Sea, the Third Circuit also concluded that the balance of

private interest factors tipped heavily in favor of dismissal. *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027, 1030 (3d Cir. 1980). *See also, Fosen* v. *United Technologies Corp.*, 484 F. Supp. 490 (S.D.N.Y. 1980) (dismissal on grounds of *forum non conveniens* based on same facts as *Dahl*). Since plaintiffs do not urge that either the court of appeals' or district court's evaluation of the private interest factors constituted an abuse of discretion, it would serve no useful purpose to recapitulate the thorough examination of those factors here. *Pain*, 637 F.2d at 786-91.

Weighing the public interest factors, the court of appeals concluded that retention of jurisdiction would be unduly burdensome to the community, that there is little or no public interest in the dispute, and that foreign law will predominate if jurisdiction is retained. *Pain*, 637 F.2d at 792-95. Plaintiffs suggest that the court of appeals erred when it held that "the comparative amount of recovery obtainable in the two alternative forums has never been considered a factor relevant to the *forum non conveniens* inquiry." *Pain*, 637 F.2d at 794. They contend that UTC's motion to dismiss was motivated solely by the prospect of lower damage awards. There are at least two responses to this contention. First, as the D.C. Circuit observed 637 F.2d at 783, "[t]o recognize that *forum non conveniens* was never designed to permit forum shopping by defendants does not, however, compel the conclusion that the doctrine condones forum shopping by *plaintiffs*." The record in this case plainly reveals that the controversy has no connection with the forum in which suit was brought by plaintiffs. Consequently, plaintiffs can hardly be heard to argue that UTC's alleged motivation should control disposition of the *forum non conveniens* motion. Second, it is now well settled that a different standard of damages is an insufficient basis for avoiding

a dismissal on *forum non conveniens* grounds. *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932); *Alcoa*, 636 F.2d at 871. In *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976), the Second Circuit wrote:

> A district court has discretion to dismiss an action under the doctrine of *forum non conveniens*, however, even though the law applicable in the alternative forum may be less favorable to the plaintiff[s'] chance [and amount] of recovery. *Canada Malting Co., Ltd.* v. *Paterson Steamships*, 285 U.S. 413, 418-20 (1932). A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover.

In any event, both the American and Norwegian law that might govern these cases provide for "fair and just compensation for the pecuniary loss sustained." *Pain*, 637 F.2d at 794; 46 U.S.C. § 762 (1976). *See also Fosen*, 484 F. Supp. at 504 (under Norwegian law UTC could be subject to unlimited liability).

Finally, plaintiffs argue that the district court should have transferred these cases, *sua sponte*, to the District of Connecticut pursuant to 28 U.S.C. § 1404(a). Section 1404(a) however, provides no remedy under the circumstances presented here. "This statute does not apply where an action is brought in a federal court and a defendant moves for its dismissal—not its transfer—on the ground that the more convenient forum is in the courts of another country. In such a situation, the federal district courts still employ the pre-1948 nonstatutory, so-called common-law doctrine of *forum non conveniens*." Speiser and Krause, *Aviation Tort Law* (1978) at 227. *See also Paper Opera-*

tions Consultants International Ltd. v. *SS Hong Kong Amber*, 513 F.2d 667, 670 (9th Cir. 1975) ("The federal courts, however, 'retain the inherent power to refuse jurisdiction of cases not within § 1404(a)-cases, which should have been brought in a foreign jurisdiction, rather than in the United States.' "); *DeMateos* v. *Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977). Accordingly, the district court was not required to transfer these cases to Connecticut.

CONCLUSION

The overwhelming weight of both private and public interest factors dictated dismissal of these actions in favor of the foreign courts. Both the district court and the court of appeals carefully evaluated and weighed the relevant factors. Under such circumstances this Court should not interfere with the district court's exercise of discretion in its *forum non conveniens* determination, and the petition for a writ of certiorari should be denied.

Respectfully submitted,
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